IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

STATES OF NORTH DAKOTA, *et al.*,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants,

Case No. 3:15-cv-00059-DLH-ARS

DEFENDANT-INTERVENOR SIERRA CLUB'S MEMORANDUM IN OPPOSTION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

We rely on clean water for drinking, to irrigate crops, for swimming and fishing, and as habitat for wildlife. Wetlands and other waters reduce flooding and filter pollution. Since 1972, the Clean Water Act, one of our earliest and most important environmental laws, has helped restore and protect our Nation's waters. This case concerns challenges to a federal rule that guides agency determinations regarding applicability of those protections to our Nation's water; challenges that seek to narrow the waters that will be protected from pollution or destruction. Make no mistake, the challenges here seek to increase pollution or destruction under the guise of 'state control,' but in fact, under the Clean Water Act, states can always apply more stringent or more broad protections than afforded under the Act. *See*, *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 574-575 (D.C. Cir. 1980). Therefore, this challenge goes directly to whether states should be allowed to narrow the Act to allow dirtier water and less protection for wetlands and river-tributaries than the minimums required under the Act.

After decades of failures in protecting and cleaning up the nation's waters, Congress passed the Federal Water Pollution Control Act, commonly known as the Clean Water Act, with the stated objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. *See also*, *Envtl. Pro. Agency v. California*, 426 U.S. 200, 202-09 (1976); *American Paper Inst., Inc. v. Envtl. Pro. Agency,* 890 F.2d 869, 870-71 (7th Cir. 1989); *Montgomery Envtl. Coal.*, 646 F.2d at 574; and H.R. 11,896, 92nd Cong. (1971) and S. 2770, 92nd Cong. (1971) (the Clean Water Act bills were written to expand federal authority and control over waters in order to control and eliminate pollution across the country). During the course of the Clean Water Act's passage, discussion centered on ensuring that the term navigable waters would not be defined or construed narrowly, as to do so would defeat the intent of the Act. H.R. Rep. No. 92-911 at 76–77 (1972) and S. Rep. No. 92-414 at 77 (1971). *See* *also*, 118 Cong. Rec. 33,756–57 (Oct. 4, 1972). Congress recognized that to achieve its ambitious goal of restoring and protecting our Nation's waters, it would be necessary to "control pollution at the source," and not just rely on inadequately enforceable state by state standards. S. Rep. No. 92-414 at 77 (1971). Therefore, the Act applied not just to navigable-in-fact waters, but to the "waters of the United States," with Congress recognizing that waters are hydrologically-connected, necessitating broad application in order to ensure that the Nation's waters were clean and safe. S. Rep. No. 92-414 at 77 (1971) and H.R. Rep. No. 92-911 at 76-77 (1972).

For decades, the Clean Water Act was broadly applied to indeed protect "the Nation's waters" which included many types of waters. As a result, the Supreme Court has concluded, that term extends to waters that have a significant impact on traditionally navigable waters. *Rapanos v. United States*, 547 U.S. 715, 779-81 (2006).

The task of the Environmental Protection Agency and the Army Corps of Engineers (the "Agencies") in devising the Clean Water Rule (the "Rule"), 80 Fed. Reg. 37,054 (June 29, 2015), was to demonstrate, through scientific evidence, which waters significantly influence traditionally navigable waters. They did so with an unprecedented review of the scientific literature with additional advice and comment of experts on topics from biology to hydrology to geology to oceanography to soil science, describing the many vital connections between tributaries, wetlands, and downstream waters. The report titled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (hereinafter the "Science Report") EPA-HQ-OW-0880-20858, found extensive, evidence that tributaries and wetlands play critical roles in maintaining the physical, chemical, and biological integrity of downstream waters.[1] The Agencies based the Rule on this evidence.[2]

The Plaintiff and Plaintiff-intervenor States (the "States") base their challenges to the Rule on attacks on the Agencies' scientific determinations. Their claims that the Rule violates Supreme Court precedent or various Constitutional limitations on federal powers all have as an underpinning, criticisms of the science relied upon by the Agencies. If the science supports the Rule, then the foundation of the States' challenges fails and the challenges fall away. The scientific underpinnings are myriad and sound, and the legal foundations for the Rule are solid.

The States may prefer less regulation and more latitude to allow dirtier water, but in 1972 Congress disagreed with that failed approach. The Act's vision and purpose was to fully protect the waters of the United States from pollution, degradation, and destruction. The Rule effectuates Congress's intent and the State's Motions should be denied.

BACKGROUND/STATEMENT OF THE CASE

I. THE CLEAN WATER ACT'S PURPOSE IS TO RESTORE AND PROTECT THE WATER RESOURCES OF THE UNITED STATES.

Congress stated its goal in enacting the Clean Water Act as nothing less than to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress identified what that meant by directing that water quality be protected as necessary to foster and ensure clean water for public water supply, propagation of fish, shellfish, and wildlife, use for recreation, agriculture and industry, and for the protection of navigation. 33

[1] Documents in the Administrative Record will hereafter be cited to as "AR" by the last digits of the Regulations.gov document number and the page where appropriate.

[2] On June 29, 2018, the Agencies publicly stated their intent to withdraw the Rule. The Agencies have refused to inform defendant-intervenor whether they will defend (or attack) the Rule here. Given that the Agencies' brief is due simultaneous with that of defendant-intervenor, it is impossible for defendant-intervenor to address arguments that may be raised by the Agencies in this brief, and therefore may request supplemental briefing after review of the Agencies' brief.

U.S.C. §§ 1251(a)(2) and 1313(c)(2)(A).

Congress passed the Clean Water Act in 1972 in order to expand on and strengthen the laws protecting the Nation's waters because up to that time, the law was restricted to providing assistance to states in an attempt to incentivize them to do the right thing and protect and clean up the water. *EPA v. California*, 426 U.S. at 202-09; *American Paper Inst., Inc.*, 890 F.2d at 870-71. The assistance and incentives-based system, dependent on states, had failed, necessitating more comprehensive measures. *Id.* In developing a law that would provide more consistent and comprehensive protections across the Nation, Congress directed the "broadest possible" definition of "navigable waters" of the United States unencumbered by earlier narrower interpretations. H.R. Rep. No. 92-911 at 76-77 (1972).[3] In so doing, Congress spoke to the science of waters being interconnected and the need to ensure that aquatic ecosystems—waters upstream of and within connections with "traditionally navigable" waters—be protected if the Clean Water Act's purpose is to be fulfilled. Congress recognized that "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77 (1971). Even the narrowest provisions in Justice Scalia's opinion in *Rapanos* recognizes that in passing the Clean Water Act, Congress intended to cover a much broader set of waters than had earlier been the case or than was traditionally considered "navigable." *Rapanos*, 547 U.S. at 731.

Courts have consistently found, both before and after the Supreme Court's decision in

[3] A pointed reminder that Congress intended the definition of "navigable waters of the United States" to mean waters more broadly than those considered traditionally navigable can be found in the provisions directing states to adopt and implement water quality standards that are protective of water uses "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c). Plainly, navigation was only one consideration in the direction to protect water quality.

Rapanos, that Congress intended to "occupy the field" of protecting waters, that the Clean Water Act was intended to wholly supplant the law that came before, that Congress intended to regulate the discharge of pollutants into non-navigable tributaries and adjacent wetlands because anything less leaves even traditionally navigable waters unprotected, and that Congress "knew exactly what it was doing" when it defined "navigable waters" broadly to mean the "waters of the United States." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1321,1324, 1325 (6th Cir. 1974) (quoting 33 U.S.C. § 1362(7)). *See also, e.g., City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317-19 (1981); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 22 (1981) (existing statutory scheme of state control and incentives completely revised by Clean Water Act); *U.S. v. Hubenka*, 438 F.3d 1026, 1030-1032 (10th Cir. 2006); *U.S. v. HVI Cat Canyon, Inc.*, 213 F.Supp.3d 1249, 1268 (C.D. Ca. 2016) (citing *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978)) wherein the Circuit Court held that "navigable waters" must be given the broadest possible constitutional interpretation). *See, infra* at 6 and 13-14 for discussion of post-*Rapanos* case law. While Congress did preserve important roles for states giving them the first obligation and authority to develop water quality standards and the ability to be delegated permit authority, Congress made plain that state obligation and authority is *always* subject to the review and authority backstop of the EPA and that the federal law and EPA set the Clean Water Act minimum for water quality standards, permitting, and effluent limits in the effort to address previous short-comings in clean water efforts. *See* 33 U.S.C. §§ 1313, 1314, 1316, and 1342.

The Supreme Court recognized the Act's broad scope when it upheld the Act's application to adjacent wetlands, observing that the Act incorporates a "broad, systemic view of the goal of maintaining and improving water quality." *United States v. Riverside Bayview*

Homes, Inc., 474 U.S. 121, 132 (1985). The Court also noted Congress's determination that "[p]rotection of aquatic ecosystems. . . demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-33 (quoting S. Rep. No. 92-414, p. 77 (1971)).

Consistent with Congress's vision, for nearly three decades the Agencies implemented the Act to fully protect the waters of the United States, including tributaries and wetlands.[4] The Rule here simply maintains full protection for the nation's waters, adhering to the direction of *Rapanos* and the Circuit Courts along with adherence to and application of the best science.

II. RECENT SUPREME COURT DECISIONS LED THE AGENCIES TO DEVELOP A RULE TO ENSURE CONGRESS' VISION WAS REALIZED WITHIN THE DIRECTION OF THE COURT.

Two cases created some confusion over the scope of the Act's coverage. In *Solid Waste Agency of Northern Cook County* ("*SWANCC*") *v. United States Army Corps of Engineers*, 531 U.S. 159, 162, 164 (2001), the Court ruled that the Agencies' "Migratory Bird Rule," could not be used to extend the reach of the Act to "an abandoned sand and gravel pit." Then, in *Rapanos v. United States*, 547 U.S. 715, 729 (2006), the Court remanded, for further review, the Corps' application of the Act to four wetlands "lying near ditches or man-made drains that eventually empty into traditional navigable waters." *Rapanos* produced splintered opinions, with no majority: a four-Justice plurality authored by Justice Scalia, proposed one test for determining whether a water body is a "water of the United States"; Justice Kennedy, concurring in the judgment, proposed another, commonly referred to as the "significant nexus" test; and four

[4] Immediately following passage of the Act, the Corps adopted regulations protecting only tidal and navigable-in-fact waters previously regulated, but a court quickly rejected that narrow interpretation, *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975), holding that the Corps was "without authority to amend or change the statutory definition of navigable waters," ordering regulations "recognizing the full regulatory mandate" of the Act.

dissenting Justices would have left the Agencies' definition in place, but also said they would uphold protection for waters satisfying *either* the plurality's or Justice Kennedy's test. *Id.* at 810 (Stevens, J., dissenting). While neither *SWANCC* nor *Rapanos* invalidated any specific regulatory provision, the decisions at first left the Agencies with having to decipher whether there was a controlling outcome and if so, what the outcome dictated.

Both *SWANCC* and Justice Kennedy's opinion in *Rapanos* emphasized that for a nonnavigable water or wetland to be covered by the Act, it must have a "close" or "potentially. . . close" connection to a navigable water; a "significant nexus." *Id*. at 759. Following *Rapanos*, the Circuits all either adopted Justice Kennedy's significant nexus test, or found that a waterbody that met *either* the significant nexus test or Justice Scalia's test, should be protected under the Act. *See, citations at 15-16, infra* and Technical Support Document, AR 20869, at 41-42.

The Agencies decided that after *Rapanos*, "almost all waters and wetlands theoretically could be subject to a case-specific jurisdictional determination" in order to determine significant nexus. 80 Fed. Reg. at 37,056. But these demonstrations could be time-consuming and costly, limiting the Agencies' determinations and thereby limiting implementation of Clean Water Act protections. It also resulted in the Agencies effectively presuming no Clean Water Act protection, unless and until the nexus could be shown in each case, turning Congress' intent that the Act apply broadly on its head. *See* Comments' discussion post-*Rapanos* application at AR 16674 at 18-30 and documents cited therein. *See also,* 80 Fed. Reg. at 37,056.

III. THE RULE MOVES TO PRESERVE THE ACT'S PROPER SCOPE OF PROTECTION.

The Rule protects waters that are scientifically demonstrated to have a significant impact on navigable waters. The Agencies began the rulemaking process at issue here, by producing and vetting—with input and advice from the Science Advisory Board and various individual expert panelists—the Science Report, a state-of-the-art review and synthesis of the extensive scientific literature describing the numerous important connections between tributaries, adjacent waters, wetlands, and downstream waters. *See* AR 004, 005, 7617, 7531, and 14564 for drafts of Science Report and review and comments by SAB and individual panel members. The Science Report synthesized the published, peer-reviewed scientific literature (*see, e.g.*, first 10 pages of index to Administrative Record for this case and 50+ pages of peer-reviewed literature references at end of Science Report) discussing the physical, chemical, and/or biological connectivity between various kinds of streams, wetlands, and other waters, and downstream water bodies. The final Science Report provides the scientific foundation for much of the Final Rule. AR 20848; 80 Fed. Reg. at 37,057, 37,065.

The Science Report found unequivocal and consensus evidence that *all* tributaries, including perennial, intermittent, and ephemeral streams, "exert a strong influence on the integrity of downstream waters," AR 20848 at ES-2, and that all tributaries have a significant nexus to traditional navigable waters, interstate waters, and the territorial seas (collectively, "foundational waters"). Thus, the Agencies restored the Act's categorical coverage of tributaries, as defined in the Rule. 33 C.F.R. § 328.3(a)(5). The Science Report also found clear evidence that wetlands and open waters in floodplains are "highly connected" to tributaries and rivers "through surface water, shallow groundwater, and biological connectivity." AR 20848 at ES-2, and 4-1 et seq., especially 4-39. Relying on these findings, the Agencies concluded that all waters adjacent to foundational waters, impoundments, and tributaries have a significant nexus to foundational waters. 33 C.F.R. § 328.3(a)(6). Finally, the Science Report found that wetlands and open waters located outside of floodplains also provide numerous functions, such as storage of floodwater, that benefit downstream water integrity, AR 20848 at ES-3, 4020, and 4038, such that certain defined non-adjacent waters can be subject to determination on a case-by-case basis to have a significant nexus to foundational waters. 33 C.F.R. § 328.3(a)(7)-(8). The SAB largely endorsed and supported the analysis and conclusions in the Science Report underlying the Rule. AR 7531 and 8046.

The Agencies issued the final Rule on June 29, 2015 and have fully defended it since. The Agencies have also cited repeatedly to the Science Report in their defense of the Rule in the Sixth Circuit Court of Appeals filed January 13, 2017, Case No. 15-3751, ECF No. 149.

The Rule divides waters into three groups: (1) waters categorically protected, (2) waters that can be protected upon a case-by-case showing of a significant nexus, and (3) waters excluded from protection. There are six types of waters that receive automatic protection under the Rule. The first three are, traditional navigable waters, interstate waters, and the territorial seas. 33 C.F.R. 328.3(a)(1)-(3).[5] This brief will refer to these three categories as "foundational waters." The Rule also categorically protects tributaries and waters adjacent to foundational waters. *Id.* § 328.3(a)(4)-(6).

Waters in two categories qualify for protection if a case-by-case analysis shows they have a "significant nexus" to foundational waters. One category is waters that, echoing Justice Kennedy, are shown to individually or in combination with "similarly situated" waters in a watershed that drains to a foundational water, significantly affect the chemical, physical or biological integrity of the downstream waters. *Id.* § 328.3(c)(5) (emphasis added). The other category has a physical limitation—waters that can be assessed case-by-case for significant nexus, but *only* if they are located within the 100-year floodplain of a foundational water or are

[5] The Rule makes these changes to several sections of the Code of Federal Regulations but for ease of reference, this brief will refer to the changes as codified in 33 U.S.C. part 328.

within 4,000 feet of a foundational water, impoundment, or tributary. *Id*. § 328.3(a)(8). The Rule excludes from case-by-case determinations waters beyond those boundaries. *Id*.

The States take issue primarily with two types of waters that are categorically protected: tributaries and waters adjacent to navigable waters of the U.S. and with the measures for case-by-case consideration.

SUMMARY OF THE ARGUMENT

The Rule complies with the Clean Water Act and is not arbitrary and capricious because it protects waters that have a significant nexus to downstream waters consistent with the direction of Congress and the Supreme Court. Further, the scientific record soundly confirms, contrary to the unsupported assertions of the States, that tributaries and adjacent waters significantly influence downstream waters.

The States' constitutional arguments also fail. There is no Commerce Clause or Tenth Amendment violation, because the Rule covers waters that have a significant nexus to navigable waters of the U.S., within the boundaries of Congressional authority and as directed by Congress and the Supreme Court. There is no due process violation because the Rule reduces uncertainty by providing guidance and definition for jurisdictional decisions and is not vague.

The Rule does not represent a "transformative" expansion of water protection because the Rule actually details and curtails the application of the Act as compared to the past and it does so at the direction of the Supreme Court.

Finally, there is no violation of Notice and Comment requirements of the Administrative Procedure Act, because the Rule is the logical outgrowth of the proposed rule and comments.[6]

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[6] Defendant-intervenor takes no position on the States' arguments concerning the National Environmental Policy Act and therefore will not present argument on that topic.

ARGUMENT

I. STANDARD OF REVIEW.

The Court's review of agency decisions is guided, first, by the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court must examine the Rule against the Clean Water Act, and "[i]f the intent of Congress is clear, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Chevron*, 467 U.S. at 842-43. If the statute is silent or ambiguous regarding the issue, then the Court inquires whether the Rule is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843.

The second part of the Court's review is governed by section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2). The Court will invalidate an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id*. § 706(2)(C); or "without observance of procedure required by law," *id*. § 706(2)(D). The Court engages in a "probing," "substantial inquiry," with the agency action entitled to a presumption of regularity. *Citizens to Preserve Overton Park*, *Inc. v. Volpe*, 401 U.S. 402, 415 (1971). A rule is arbitrary and capricious if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that is counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

II. THE RULE COMPLIES WITH THE CLEAN WATER ACT BECAUSE IT PROTECTS WATERS THAT HAVE A SIGNIFICANT NEXUS TO DOWNSTREAM WATERS.

A. The Rule's Reliance On The Significant-Nexus Test Comports With Supreme Court Case Law, While The States' Exclusive Focus On The Narrower Test Articulated By Justice Scalia Is Inconsistent With Broad Precedent.

According to the Supreme Court, a water may be defined as a "water of the United States"—protected under the Clean Water Act—if it significantly affects a traditional navigable water, interstate water, or the territorial seas. The Agencies properly used this significant-nexus standard when defining the breadth and application of the Act's protections under the Rule.

The Supreme Court's first interpretation of the scope of the Clean Water Act expressly upheld federal authority to regulate discharges into both traditional navigable waters and wetlands adjacent to such waters. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 135 (1985). The Court explained that in light of the "breadth of federal regulatory authority contemplated by the Act," and the difficulty of line-drawing in this context, the agency's ecological judgment that wetlands have significant impacts on water quality and the aquatic ecosystem in adjacent waterways is sufficient to deem such wetlands covered by the Act. *See id.* at 134. As long as the covered wetlands have such effects in the majority of cases, all such wetlands may be covered. *Id.* at 135 n.9.

The Court reiterated the importance of a waterway's impacts on traditional navigable waters when examining the Act's scope in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* 531 U.S. 159 (2001). There, the Court addressed a narrow issue and overturned a regulatory interpretation that would have protected "an abandoned sand and gravel pit" on the basis that it was used by migratory birds. *Id.* at 162, 164, 174. The Court distinguished the wetlands at issue in *Riverside Bayview* from the sand and gravel pit in *SWANCC* because of the "significant nexus" the *Riverside Bayview* wetlands had with other waters of the United States. *See id*. at 167. The Court, however, did not invalidate any portion of the federal regulations—it held only that the regulations, "as clarified and applied to petitioner's balefill site" under the Migratory Bird Rule, exceeded the Corps' authority. *Id*. at 174.

Finally, in *Rapanos v. United States*, 547 U.S. 715 (2006), the Court remanded for further review the Corps' determination that certain wetlands, which were adjacent to non-navigable waters, were "waters of the United States." *Id*. at 729, 757, 759. A four-Justice plurality devised one test for the courts to apply on remand in identifying "waters of the United States," while again recognizing that the Act applies more broadly than to just "traditionally navigable" waters, *id*. at 757 (plurality opinion); Justice Kennedy employed another, *id*. at 759 (Kennedy, J., concurring in the judgment); and four dissenting Justices would have deferred to the Corps' regulations as the proper test. *Id*. at 810 (Stevens, J., dissenting).

The Rule employs the test articulated by Justice Kennedy in *Rapanos*, which drew on *Riverside Bayview* and *SWANCC*. Justice Kennedy concluded that the Act protects wetlands with a "significant nexus" to waters traditionally considered navigable. *Id*. at 759, 787. Such nexus exists where the water, including wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. Justice Kennedy explained that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow. . . their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 780-81. Justice Kennedy acknowledged that isolated wetlands may be protected by the Act, singly or in combination with similarly situated wetlands, as they can significantly affect other covered waters "more readily understood as navigable", and that the Corps may properly determine that proximity, volume of flow (annually or on average), or other relevant considerations may form the foundation for protecting a wetland under the Act. *Id*. at 780. This is precisely the approach in the Rule.

Justice Kennedy also pointed out that ephemeral waterways, which may be dry much of the time, as well as wetlands without a surface connection to tributaries, can still meet the significant nexus standard. He described the plurality's attempt to impose a continuous flow requirement as making little sense, because "torrents thundering at irregular intervals through otherwise dry channels," which could significantly affect downstream waterways, would not be covered. *Id*. at 769; *see* fig.2 below. Similarly, Justice Kennedy noted that wetlands separated by land from another waterway can be vital to it: if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." *Id*. at 775. The very absence of a hydrological connection could thus make protection of the wetland critical. *Id*.

Justice Kennedy made clear that water bodies could be shown to have a significant nexus on a categorical basis, and all water bodies within those categories could be protected, even if specific individual waters in the class did not influence downstream water quality. *Id.* at 780-81.

> The Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, *in the majority of cases*, to perform important functions for an aquatic system incorporating navigable waters.

Id. (emphasis added). This categorical approach follows that of the unanimous Court in *Riverside Bayview*, which noted:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that *in the majority of cases*, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9 (emphasis added). In making these categorical judgments, the Agencies' ecological judgment about the importance of certain waters need not be so refined that each and every water body within the category must, alone or cumulatively, have significant downstream effects. Waters qualify for Clean Water Act coverage on a categorical basis if the agencies reasonably conclude that a majority of waters in the category likely have a "significant nexus."

It must be noted that the States' brief's consistent citation to Justice Scalia's plurality opinion for its incorrect arguments regarding the Rule, and references to Justice Kennedy only in support of references to Justice Scalia, are not consistent with the overwhelming status of the case law on these issues following the *Rapanos* decision. The States thereby paint a misleading picture of the Supreme Court underpinnings for the Rule.

First, binding precedent in the Eighth Circuit directs that waters that meet *either* Justice Kennedy or Justice Scalia's approach must be considered waters of the U.S., protected by the Clean Water Act. *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

Second, all of the Circuit Courts that have addressed the issue of Clean Water Act jurisdiction following *Rapanos* have applied Justice Kennedy's significant nexus analysis or, have adopted the even broader application of the Act's protections similar to the Eighth Circuit. *See, United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009) and *United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) (if either plurality or Justice Kennedy's test is met, there is a "water of the United States"); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006) (Court looks to "significant nexus" standard as precedent); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007) (same); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (same) (followed by *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011) where court describes Justice Kennedy's concurrence as the "controlling rule of law"); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (same); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (same). *See also, Precon Dev. Corp., Inc. v. United States Army Corps of Engineers*, 633 F.3d 278, 289-90 (4th Cir. 2011) (parties agree and court adopts Justice Kennedy significant nexus test, approving of Corps definition of "adjacent") and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649 n.10 (4th Cir. 2018) (characterizing Justice Kennedy's *Rapanos* concurrence as "controlling"). The States' reliance on Justice Scalia's plurality opinion should be rejected as inconsistent with this Circuit's controlling precedent and inconsistent with precedent throughout the circuit courts of appeal.

B. The Scientific Record Confirms That Tributaries And Adjacent Waters Significantly Influence Downstream Waters.

1. Tributaries

Tributaries to foundational waters are categorically waters of the U.S. under the Rule, entitled to protections under the Act. Tributaries are defined as a water that contributes flow, either directly or through another water to a foundational water, and a tributary is characterized by the presence of physical indicators of a bed and banks and an ordinary high water mark. 33 U.S.C. § 328.3(c)(3). The Rule further explains that these physical indicators demonstrate that there is a volume, frequency, and duration of flow sufficient to be considered a tributary.

The record overwhelmingly supports the Agencies' determination that tributaries and adjacent waters have a significant nexus to foundational waters. The Science Report demonstrates tributaries and adjacent waters play fundamental roles in determining both the course a river takes and what is in it. Tributaries supply initial flow (from snowmelt collecting or channeling area precipitation, or from springs or upwellings) as well as the materials that form the river's bed and banks, such as sediment, and the materials that fill it, such as water, nutrients, and organisms. *See, e.g.*, Science Report AR 20848 at 3-47 tbl.3-1, 4-40 tbl.4-3. In some cases, they do this by filtering or settling out, or delaying the delivery of, other materials, like contaminants or floodwaters. *Id*. at 3-47 tbl.3-1, 4-40 tbl.4-3. Tributaries can also serve as nurseries or spawning areas during certain times of the year for species that then migrate downstream later in their life stages, for example, as part of migrating salmon lifecycles on both coasts. *See, e.g., id*., at ES-5 and 13, 1-9, 2040, and 2-44.

To understand the significance of connections between tributaries and downstream waters, or between adjacent waters and downstream waters, one must consider the combined effect across the watershed and over time. *Id*. at 6-10. By analogy, if one wanted to learn how local traffic contributed to arterial highway traffic, you would not rely on a snapshot of a single local road in the middle of the afternoon or night. If you did, you might conclude, incorrectly, that local roads were not contributing any traffic to the highway. Instead, you would collect data from roads and interchanges throughout the area, at low-traffic and high-traffic times, and look at all the data together to understand the impact of local traffic on the regional highway.

Just as a highway has many inputs, so does a river—each tributary contributes water, sediment, chemicals, and organic material, as well as providing connected habitat for any number of aquatic species, and together these inputs and functions constitute the river. And, just as traffic on a highway fluctuates at different times of the day and week, river networks expand and contract as the seasons change and as precipitation comes and goes. The illustration below shows the same river during wet and dry periods. *See* fig.1. If you looked only at the connections between the river and its immediately visibly adjacent wetlands during the dry period, you might underestimate the significance of those connections. As the Science Report concluded, the effects of tributaries and adjacent waters on downstream waters are cumulative, and the connections between those waters must be analyzed together over time. *Id.* at 6-10.

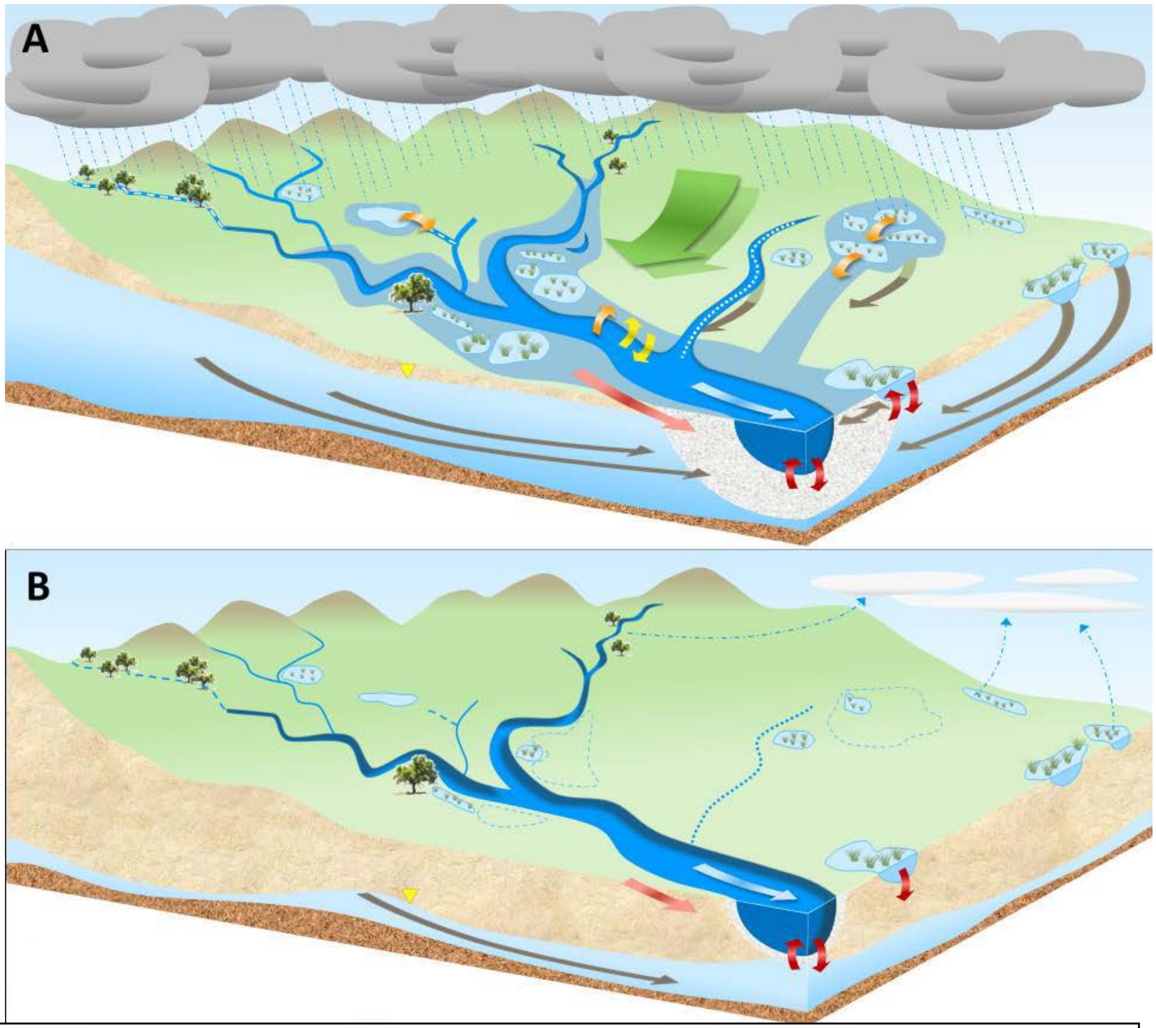

Fig. 1: A river system during wet and dry periods. Source: Science Report 1-7 fig.1-2 (including key).

The Science Report amply demonstrates that tributaries—including ephemeral and intermittent ones—and adjacent waters have a significant nexus to downstream waters.

One reason tributaries are so important to downstream waters is that, to a large degree, tributaries determine the characters of the water downstream—physically, chemically, and biologically. *Id*. at 3-45 to 3-46. A watershed is like a funnel: tributaries cover a broader expanse than rivers do, and they collect water and other materials across that broad area, and deliver it toward a concentrated point downstream. *Id*. at 3-5. In the arid and semiarid Southwest, where the majority of tributaries are seasonally dry, *id*. at 2-29, flows from ephemeral tributaries are still a "major driver" of flows in downstream rivers, even despite their "ephemeral" nature (which simply means that they do not have visible surface water at all times). *Id.* at B-59. Ephemeral channels supply substantial amounts of surface water to rivers during infrequent, but very influential, flood events. *Id*. For instance, during a high-intensity storm in New Mexico that dropped up to one-quarter of the area's annual rainfall over the course of two days, flood flows from the Rio Puerco, an ephemeral tributary to the Rio Grande River, accounted for 76% of the flood flow downstream in the Rio Grande. *Id*. at 3-7 to 3-8; Vivoni 2006; *see* fig.2. Those flows plainly physically affect downstream waters, but also play critical roles in replenishing sediments or nutrients or building aquatic habitat.

September 14, 2003
September 26, 2003

Fig. 2: Floodwaters swelling and receding in the Rio Puerco, an ephemeral tributary. Source: Vivoni 2006.

Even when water in ephemeral tributaries sinks into the ground before reaching downstream rivers, it plays a critical role in replenishing shallow groundwater flows. These groundwater flows, in turn, are a vital source of surface water for the downstream rivers when they resurface through springs or base flow. *Id*. at B-59, 5-8 (ephemeral tributaries supply roughly half of the San Pedro River's "baseflow," the portion of the river fed by groundwater), B-39 (most perennial and intermittent rivers in the Southwest are groundwater dependent). As noted by the SAB and the independent comments of panel experts on the Rule, shallow groundwater is a vital connection between waterbodies and serves important physical and biological functions for rivers. *See, e.g., id.* at ES-2 to 3, ES-8 to 9, 2-11 (incl. Fig. 2-5), 2-34, 4-11, 4-14, 4-22 to 23 and 28, 5-2.

Tributaries also have a major influence on the chemical composition of downstream waters. *Id*. at 3-46, 6-1 to 6-2. This makes sense: tributaries supply a large proportion of the water in rivers, and that water carries chemicals—both good and bad—with it. *Id*. at 3-22. For example, in the Southwest, organic material, important for biological productivity, accumulates in ephemeral channels during dry periods and is carried downstream in great quantities when those channels fill with floodwater. *See id*. at 3-29, B-48 (in the San Pedro River, dissolved organic carbon doubled or tripled during storm events from a flush of terrestrial organic matter and nutrients). Tributaries can also affect the chemical makeup of downstream waters by contributing, removing, transforming, or delaying the delivery of harmful chemicals discharged upstream. *Id*. at 3-47 tbl.3-1.

Finally, tributaries are essential to living organisms in downstream waters. *Id*. at 3-46. Headwaters (the tributaries at the top of the funnel, so to speak) provide crucial habitat for many aquatic species, including plants, insects, crustaceans, and fish. *Id*. at 3-38, 6-3. In the arid and semiarid Southwest, fish may not travel up ephemeral channels to the same degree, but water flowing down those channels has a significant influence on fish in downstream rivers. Native fish are adapted to the variable flows that ephemeral tributaries provide, and these adaptations allow them to outcompete invasive species. *Id*. at B-38, B-58. Many western rivers are fed significantly by snowmelt from in tributaries high in the watershed and the large snowmelt-fed flows in rivers like the Columbia provide the means for salmon to travel to and from spawning areas to the ocean. *Id.* at 3-46, AR 0004 3-47 and 4-1.

2. Adjacent Waters

The Rule defines adjacent waters as "bordering, contiguous, or neighboring" foundational waters, impoundments, or tributaries. 33 C.F.R. § 328.3(a)(6) & (c)(1). "Neighboring" waters are those waters that are very close to a foundational water, impoundment, or tributary (i.e., within 100 feet, *id.* § 328.3(c)(2)(i), or within 1,500 feet of tidally influenced waters or the Great Lakes, *id.* § 328.3(c)(2)(iii)), or that are within the 100-year floodplain of such a water, out to a distance of 1,500 feet, *id.* § 328.3(c)(2)(ii).[7]

Smaller tributaries have smaller floodplains than large rivers, Science Report at 4-6, and some tributaries have little or no floodplain, *id*. at 2-5, 2-6; *see* fig.3. As a result, for some tributaries the area in which waters are "adjacent" will be limited to a shorter distance than 1,500 feet, because the 100-year floodplain will not extend that far. And for some rivers with large floodplains, for example in Houston, the 100-year floodplain will extend well beyond 1,500 feet, but only waters within 1,500 feet will be deemed "adjacent."

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[7] The States mislead in their references to the 100-year floodplain. The 100-year flood and its floodplain *does not* mean that the flood occurs once every 100 years. The States know this as this is a common and explained term utilized in water and flood management by everyone from the Corps to the U.S. Geological Survey to countless municipal and local governments. *See e.g.*, https://water.usgs.gov/edu/100yearflood.html and https://www.nrcs.usda.gov/wps/portal/nrcs/detail/wi/programs/?cid=nrcs142p2_020752. Rather, it is a statistical reference, meaning the chance of a flood of that magnitude occurring is 1 in 100 *each year*. That is, the 100-year flood has a one percent chance of being equaled or exceeded during any given year. That means a 100-year flood can occur twice or more in succession.

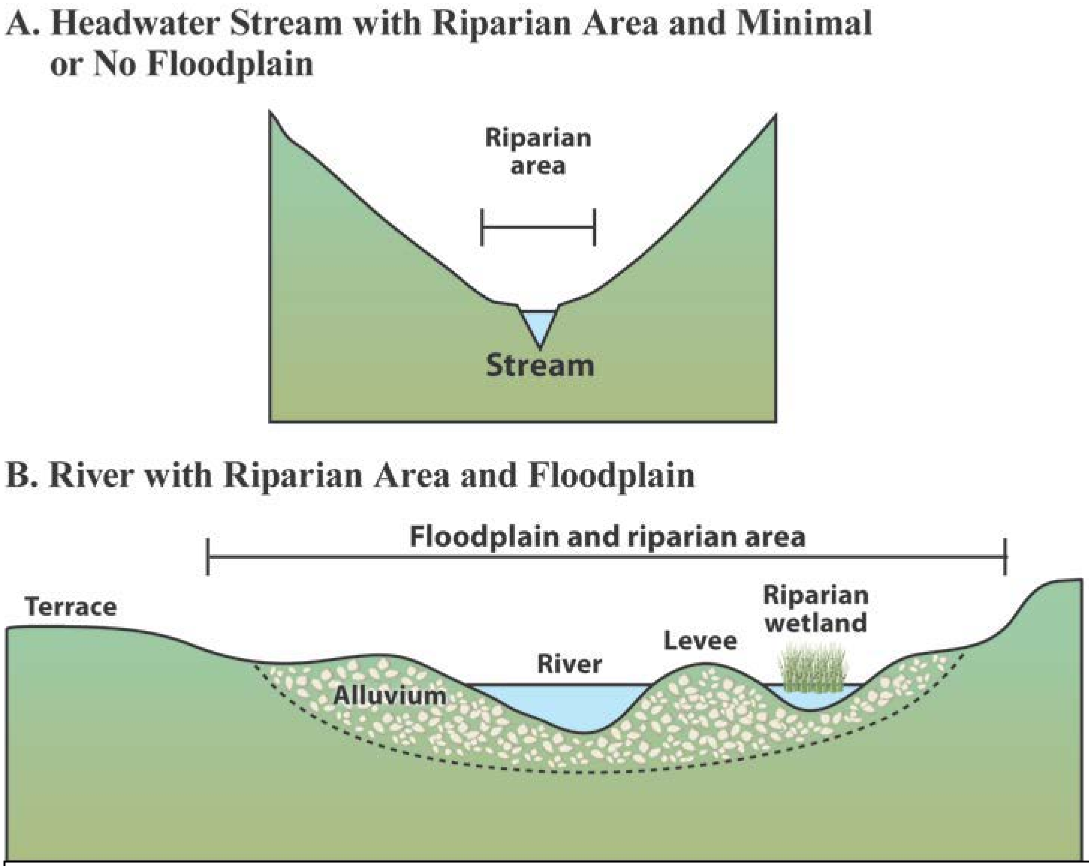
A. Headwater Stream with Riparian Area and Minimal or No Floodplain
Riparian area
Stream
B. River with Riparian Area and Floodplain
Floodplain and riparian area
Terrace
Riparian wetland
Levee
River
Alluvium

Fig. 3: A tributary with minimal or no floodplain, and a river with a larger floodplain. Source: Science Report at 2-6 fig.2-3.

The Science Report found clear evidence that wetlands located in floodplains are "highly connected" to rivers and tributaries. *Id*. at 4-39. Although the word "floodplain" may give the impression that these connections occur primarily during times of flooding, in fact, many important connections between rivers and floodplain wetlands persist at other times as well. *Id*. And again, the States misrepresent the scientific record when they suggest that a river is connected to the wetlands in the first 1,500 feet of its 100-year floodplain only once every hundred years. *See*, fn. 8, *supra*.

The physical connections between rivers and floodplain wetlands are extensive. Floods, even if infrequent, have significant, lasting, and beneficial impacts because they allow rivers and wetlands to exchange water and other materials, in both directions. *Id*. at 4-1, 4-39. For example, sediment released from wetlands during a flood can help shape a river's channel and thereby affect its physical integrity. *Id*. at 4-39. Floodplain wetlands also reduce floods by storing water that overflows from rivers or that may flow from the landscape into a river (thereby helping to control and slow flooding downstream). *Id*. at 4-1, 6-4. Wetlands can effectively act like a large sponge on the landscape in times of flood.

Even when there is no surface-water connection between a river and a neighboring wetland, shallow groundwater flows may provide a connection. *Id*. at 4-39. Tributaries and rivers are not "pipes" that simply carry water from one place to another in discrete containers. *Id*. at 2-21. They are porous, and water from a river's channel regularly enters the shallow subsurface, where it may mix with other subsurface water (including water from neighboring wetlands) before returning to the channel or even to other surface waters. *Id*. at 2-12, 4-7. Floodplains are frequently composed of alluvium—a combination of silt, sand, or other matter deposited over time—that tends to be "highly permeable" and particularly well suited to conveying shallow groundwater flows. *Id*. at 2-12; *see* fig.3 (above). These shallow subsurface flows can connect rivers to floodplain wetlands during both high-flow and low-flow periods. *Id*. at 2-12, 4-7; *see* fig.4.

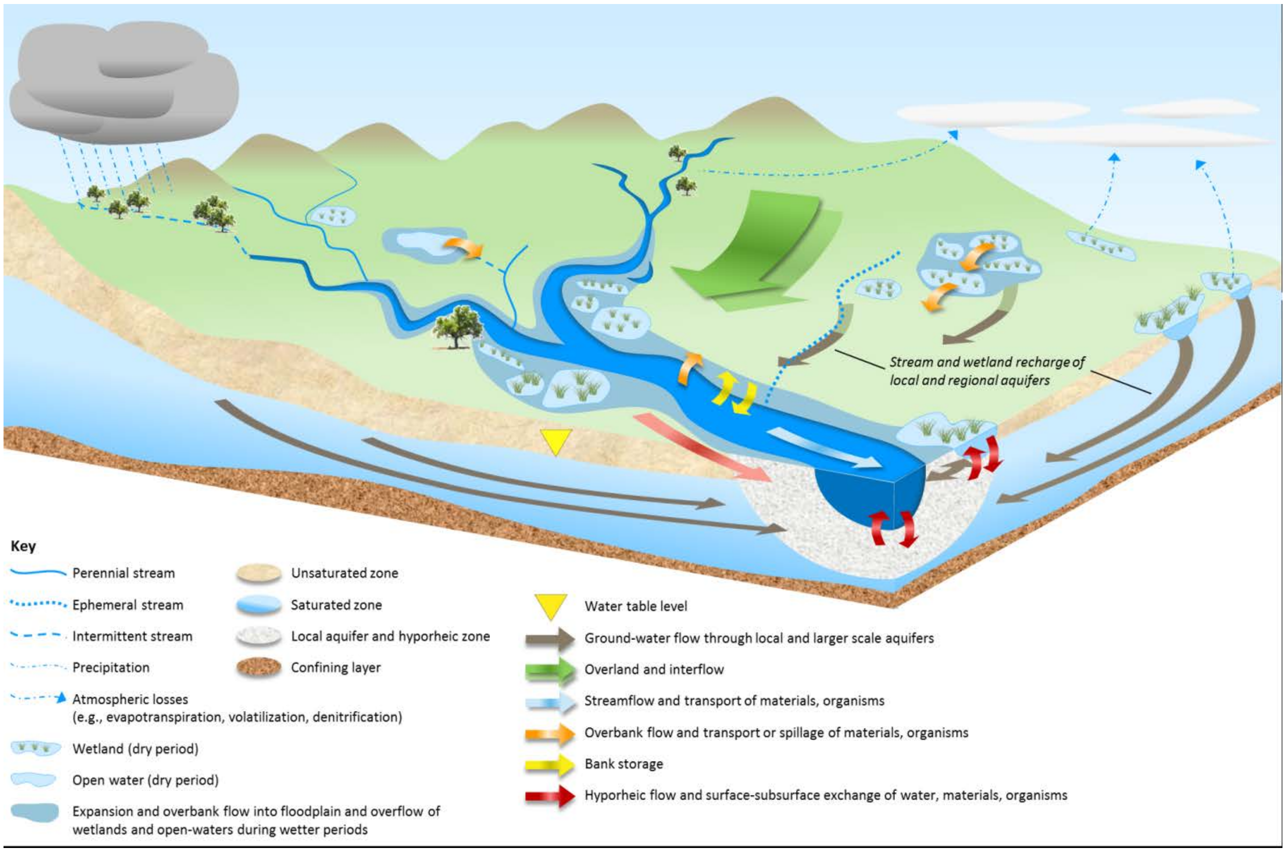
Stream and wetland recharge of local and regional aquifers
Key
Perennial stream
Ephemeral stream
Intermittent stream
Precipitation
Atmospheric losses
(e.g., evapotranspiration, volatilization, denitrification)
Wetland (dry period)
Open water (dry period)
Expansion and overbank flow into floodplain and overflow of wetlands and open-waters during wetter periods
Unsaturated zone
Saturated zone
Local aquifer and hyporheic zone
Confining layer
Water table level
Ground-water flow through local and larger scale aquifers
Overland and interflow
Streamflow and transport of materials, organisms
Overbank flow and transport or spillage of materials, organisms
Bank storage
Hyporheic flow and surface-subsurface exchange of water, materials, organisms

Fig. 4: Illustration of subsurface exchanges of water between a river and its floodplain wetlands (i.e., wetlands in the light blue band bordering the river). Source: Science Report at 1-5 fig.1-1A.

The subsurface or flood-stage flows connecting floodplain wetlands to rivers also convey chemicals. *Id*. at 4-11. One of the most important functions of floodplain wetlands is to intercept contaminants, such as excess fertilizer and pesticides from agricultural operations, by filtering them through the roots of wetland plants. The plants absorb the contaminants and prevent them from reaching the river. *Id*. at 4-11, 4-14.

Finally, wetlands provide habitat for aquatic animals, including fish that use wetlands as nurseries. *Id*. at 4-17. There is strong evidence that fish move between rivers and floodplain wetlands, even when hydrological connections between them are seasonal or temporary. *Id*.

The Science Report found compelling evidence of strong and extensive connections between tributaries and downstream waters, and between floodplain wetlands and downstream waters. *Id*. at 6-1 to 6-5. The Agencies therefore reasonably concluded that tributaries and adjacent waters have a significant nexus to foundational waters, and are categorically entitled to the protections of the Act pursuant to the Supreme Court's significant nexus test.

C. The States' Assertions Regarding Tributaries And Adjacent Waters Are Contrary To The Scientific Record.

1. Tributaries

Contrary to the States' arguments and allusions, the Agencies did not focus on the concept of "ordinary high water mark" in defining tributaries, nor does the Rule include "typically dry land." States' Br. at 17. The States misleadingly quote the definition of an ordinary high water mark and argue that it is the "same definition" Justice Kennedy criticized in *Rapanos* as "too uncertain and attenuated to serve as the 'determinative measure' for identifying waters of the United States." *Id*. at 18. The Rule does not use an ordinary high water mark as the determinative measure of the Act's coverage—the Rule requires an ordinary high water mark *and* a bed and banks *and* the contribution of flow to a downstream water. The Rule plainly requires all *three* indicators, *combined*, to define a tributary—all physical manifestations of a tributary under the Rule. 33 C.F.R. § 328.3(c)(3). Further, these indicators are fully supported by the Science Report and endorsed by the SAB and the Agencies specifically stated that they included the additional requirement of a bed and banks to help ensure that flow would be sufficient to create a significant nexus. AR 20848 at 3-45 and 5-6 and AR 7531 at 2, AR 7617 at 2, and AR 14564 at 2-3, 10-11, 10-22, 10-32, and 10-71.[8]

[8] Justice Kennedy acknowledged that rulemaking could cure some defects he identified, presumably by supplying evidence that the characteristics of a covered water demonstrate a significant nexus to downstream waters. *Rapanos*, 547 U.S. at 782 ("*Absent more specific regulations*. . .the Corps must establish a significant nexus on a case-by-case basis . . . ." (emphasis added)). That supporting evidence is what the Rule provides.

The States further claim that "bed and banks" on their own are just "erosional features" and not evidence of flow, but the only support the States offer are their allies' comment letters that agree with their view. States' Br. 19. Yet again, the Science Report and the Rule do not look to these measures in isolation, but rather require all three physical indicators, a method that is wholly supported as scientifically sound and reliable by experts from multiple disciplines.

The States point to the "arid southwest" for their claims that the definition of tributaries is faulty, but their examples fall short. First, the States suggest that in general, because tributary flows in western states may be infrequent, they cannot have a significant nexus to downstream waters. *Id*. at 19-20. But that assertion has no scientific basis: a frequent or regular flow is not a prerequisite to a water body exerting a significant influence on downstream waters. In the arid Southwest, infrequent, heavy rains are the normal precipitation pattern, and supply much of the water that flows in the region's rivers. Ephemeral tributaries, even if they flow infrequently, are responsible for carrying a substantial amount of precipitation, pollutants and other materials to rivers in the region, with the attendant physical, chemical, and biological effects, and thus are just as important as tributaries in wetter areas. *See* Section I.B. *supra* and AR 20848 at B-37 (water conveyed by ephemeral and intermittent streams in the Southwest are major drivers of the dynamic hydrology of perennial streams, and also supply aquifers which, in turn, contribute flow to perennial streams). The Science Report recognizes that water bodies can be just as significantly connected if a flow is substantial but infrequent (or subsurface) as if the flow is small but visible and constant. Science Report 1-8, 1-10. Justice Kennedy recognized this phenomenon in his *Rapanos* opinion in noting that the Los Angeles River often carries "only a trickle of water." *Rapanos*, 547 U.S. at 770. Tributaries, even when they are intermittent or ephemeral—and thus do not have constant flow—contribute significantly, individually and cumulatively, to the health and composition of downstream waters.

While the Agencies acknowledge that arid parts of the country may present more of a challenge, the Agencies are also clear that the use of *all three* physical indicators provides a conservative and careful measure of what constitutes a tributary even in the arid southwest. *See, e.g.*, Final Rule, 80 Fed. Reg. at 37,064, 37,077, 37,079 and 37,092. The Science Report also includes extensive discussion of ephemeral and intermittent streams in the arid Southwest and the special issues presented by that region. AR 20848 at 5-7 *et seq.* and B-37 *et seq.* The report devotes more than twenty-two pages to a case study of "Southwestern Ephemeral and Intermittent Streams." That case study spends six pages on the San Pedro River, but also discusses several other streams and rivers in the Southwest. *Id.* The report explains why the San Pedro is representative of other watersheds in the region. *Id.*[9]

Corps documents likewise do not demonstrate that "ordinary high water mark" indicators are meaningless in the arid Southwest, or that they have "no connection to water flow" or "future water flow," contrary to the States' claim. *E.g.*, States' Br. 19. Rather, a single Corps document found that there was no direct correlation between ordinary high water mark indicators and "inundation areas associated with specific recurrence interval flood events." Lichvar 2006 at 14 (*contra* States' Br. 19, which misleadingly ends the quote after the words "inundation areas"). But that statement does not support an assertion of no correlation to "flow" generally, and says nothing about correlation between all three markers that define tributaries in the Rule.

[9] The States also raise the Rawhide Wash with other assertions about the arid southwest, States' Br. 19-20, but the discussion is simply a mix of unscientific and undefined terms and unsupported assumptions. For example, "ordinary flow" is not a requirement of the law nor a recognized scientific concept. There is no support or context provided for the States' examples and they run contrary to the established and extensive scientific record that episodic flows or flows that do not visibly appear to reach surface waters, nonetheless have important effects on downstream rivers' chemistry and biological, as well as flow.

Moreover, another cited Corps document (Lefebvre 2013, States' Br. 19), explains that ordinary high water mark indicators "may best be described as *flow indicators*," and "are useful for identifying portions of the channel that have been inundated from the most recent flow event." Lefebvre 2013 at 17 (emphasis added). Indicators of water flow are not "meaningless" in the context of a significant nexus analysis, even if they do not correlate with specific recurrence-interval floodplains in all instances. Flow, whether continuous or intermittent, is the primary way that tributaries physically, chemically, and biologically influence downstream waters and the definitions' use of all three indicators is sound. *See, e.g.*, Science Report 3-5 (noting that most rivers receive most of their water from tributaries).

The States' depiction of the Rule's definition of tributaries as regulating "dry land" is extreme and unreasonable. It bears repeating what protection under the Act actually means for these waters. What it means is that discharge of pollution *into* tributaries (or any water receiving protection under the Act) is prohibited. 33 U.S.C. § 1311. It also means that activities that would *fill in* and degrade or eliminate waterbodies, including tributaries, is prohibited. *Id.* § 1344. It also means that activities that would actually dig up and alter or destroy waterbodies or water courses is prohibited. *Id.* These are foundational to the Act and its success, and all regulate activities being done in and to waters that Congress long ago determined were harming the waters of the Nation. Finally, each of these activities can in fact occur if they receive a permit from a proper permitting entity (often states) that ensures compliance with minimum pollutant and/or mitigation requirements to in turn ensure that the waters in place and downstream are protected. *Id.* §§ 1342 and 1344. The States' exaggerations should be disregarded in the face of the actual requirements and application of the law.

2. *Adjacent waters*

The States attack the definition of adjacency center on their objection to the use of physical proximity as a measure of adjacency, States' Br. at 22-23, but the overall approach in the Rule is plainly consistent with existing Supreme Court case law and is amply supported by the record. First, the Rule's definition of "adjacent" is fully consistent with the Supreme Court cases. In *Riverside Bayview*, the Court did not offer a specific definition of "adjacent," and instead deferred to the Corps' conclusion that wetlands "in reasonable proximity to other waters of the United States" were "inseparably bound up with" those neighboring waters from an ecological perspective, including via subsurface and biological connections. *Riverside Bayview*, 477 U.S. at 134. *SWANCC* dealt with undisputedly nonadjacent waters, and thus had nothing to say about the meaning of "adjacent." And in *Rapanos*, Justice Kennedy not only accepted the Corps' definition of "adjacent" as "reasonable," *Id.* at 775, but further affirmed that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow . . . their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id.* at 780-81. Justice Kennedy further acknowledged that isolated wetlands may well be protected by the Act, singly or in combination with similarly situated wetlands, as they can significantly affect other covered waters "more readily understood as navigable," and that the Corps may properly determine that proximity, volume of flow (annually or on average), or other relevant considerations may form the foundation for protecting a wetland under the Act. *Id.* at 780.

Second, on the issue of proximity, the Rule uses adjacency to capture waters that are, in fact, functionally related, basing the definition of adjacency on the scientific record. AR 20848 at ES-2 to 7 and 4-3 *et seq.* Using the concepts of functional relatedness discussed in the Science Report, adjacency is then defined using geographic and proximity measures—as a reasonable basis for determining such functional relatedness. Thus, the substance of the definition properly captures functional relatedness, while the actual definition properly uses geographic measures.

Third, the States are wrong when they claim that the Rule's definition of "adjacency" is flawed because, the States argue, waters within the 100-year floodplain only have a "relationship" with the river during a "once-in-a-century storm." As described above, the States' characterization of what 100-year flood means is misleading and absolutely contrary to the correct and widely-known and used definition, which is that there is a 1 in 100 chance in any given year of a flood of that particular size. *See* States Br. 22 (implying that a water within the 100-year floodplain only has "contact" with the river if there is a one-hundred-year flood).

Moreover, also as discussed in detail above, floodplain wetlands have numerous connections to the rivers and tributaries they neighbor, during both high-flow and low-flow periods. Even when there is no surface-water connection (and thus no "100-year flood"), floodplain wetlands remain connected to neighboring water bodies through shallow subsurface flows and other biological connections. The States' assertions regarding adjacency are entirely contrary to established science and the record.

3. *Case-by-case determinations*

The States mount an unfocused attack on the Rule's framework for case-by-case determinations of significant nexus. Again, the States complain about physical proximity measures and the 100-year floodplain, complaints that have been shown to lack support in the science or record, and in fact, the measures used in the case-by-case part of the Rule actually function to *limit* the scope of covered waters. Only waters that fit within the specific ecological descriptions or distance measures even get considered case-by-case. All "other waters" do not even get a case-by-case analysis.

The "functions" set forth in the Rule for assessing and determining whether a significant nexus exists, originate in Justice Kennedy's own language about significant nexus. They are science-based and the States' examples about "episodic channels" such as birds flying from waterbody to waterbody, States' Br. 24-25, are made of whole cloth lacking any foundation in reality, in Justice Kennedy's guidance to the Agencies, or in the Agencies' Science Report used to develop these components of the Rule. The "functions" set forth for assessing case-by-case waters all go to the physical, chemical, and biological connections between waters, the very test the Supreme Court has set forth, and go to the very purpose of the Clean Water Act.[10]

The States have not and cannot demonstrate that the Rule is contrary to law, that the Agencies failed to consider an important aspect of the problem, or that the Rule is unsupported by the ample record. The Rule conforms to the significant nexus requirements set forth by the Supreme Court, adopted by the Circuit Courts, and is supported by a comprehensive, science-based record. The States' arguments should be rejected and the Rule affirmed.

III. THE RULE IS NOT ARBITRARY AND CAPRICIOUS.

The States' argument that the Rule is arbitrary and capricious largely recycles the faulty legal and factual arguments concerning which test must apply and whether definitions of tributaries or adjacent waters are properly supported in the record. For all the reasons set forth above, those arguments should be rejected. The Rule applies the proper legal test and is solidly based in consensus science.

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[10] The States' also misapply and misrepresent Justice Kennedy and the Act when they claim that "chemical, physical and biological" significant nexus must all be present for every water in order to consider it worthy of protection under the Act. States' Br. at 25. But, of course, the Act does not say that. The Act says that all three must be *protected*, not that all three must be used in a manner that *limits* the reach of the Act's protections as plainly claimed by the States. The Act directs *protecting* all three in every waterbody—they are not the measure of whether it *is* a waterbody. It is a gross overstatement for the States to now suggest that Justice Kennedy was using that phrase in a manner that would allow pollution or destruction to the physical flows or biological of a waterbody as long as the pollution did not result in a chemical alteration.

One part of the States' argument on this point bears additional response, and that is the assertion on page 47 of the States' brief that significant nexus is somehow a concept or question that "science does not answer." The States fail to provide information on how they think significant nexus as outlined by Justice Kennedy and adopted by multiple circuit courts should be "answered," and that is because science is *precisely* the approach that the Act and Justice Kennedy look to. Waters possess such a nexus when they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, at 780. Justice Kennedy explained that the Corps was free, by regulation, to "identify categories of tributaries that, due to their volume of flow. . . their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." *Id*. at 780-81. Similarly, Justice Kennedy noted that wetlands separated by land from another waterway can be vital to it: if such a wetland is destroyed, "floodwater, impurities, or runoff that would have been stored or contained in the wetlands" could instead "flow out to major waterways." *Id*. at 775. The very absence of a hydrological connection could thus make protection of the wetland critical. *Id*.

Plainly, science is indeed the answer to the questions and analysis posed by Justice Kennedy as the relevant considerations in determining significant nexus. The Rule and the supporting Science Report carefully analyze and explain how waters, including isolated wetlands, perform important functions for an aquatic system that includes downstream navigable waters, how a wetland can store or contain floodwater, impurities or runoff that affect major waterways. The Rule's careful and thorough approach in that regard, wholly complies with the law and amply supports the Rule.

Presumably the States' feel the need to suggest science is not the answer because the science so overwhelmingly supports the Rule and the way that the Rule assesses or provides a framework for assessing significant nexus. The only way for the States to attack the Rule is to somehow suggest the entirety of the overwhelming record is irrelevant. It plainly is not and the argument that the Rule is arbitrary and capricious is without merit and should be rejected.

IV. THE STATES' CONSTITUTIONAL ARGUMENTS FAIL.

A. There Is No Commerce Clause Or Tenth Amendment Violation Because The Rule Covers Waters That Have A Significant Nexus To Navigable Waters.

The Constitution grants Congress authority to regulate interstate commerce. U.S. Const., art. I, § 8. The Clean Water Act's regulation of navigable and interstate waters, and their tributaries and adjacent waters, as described in the Rule, falls comfortably within this authority.

Congress's Commerce Clause authority unquestionably extends to the regulation of waters that are themselves navigable—by definition, channels of commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (Congress may regulate "the channels of interstate commerce"); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (waters are "navigable in fact" when they are or may be used "as highways for commerce"); *see also Utah v. United States*, 403 U.S. 9, 10-11 (1971) (waters may be "highways for commerce" even if not interstate); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974) (Water pollution is "a direct threat to navigation.") The Supreme Court has long accepted federal authority over interstate waters, without regard to navigability. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 105 (1972) ("Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.'"); *id.* at 105 n.6 (noting that application of federal law was important because Lake Michigan was "bounded . . . by four

States" without mentioning navigability).

By extension, the regulation of waters that significantly affect navigable and interstate waters is also within the authority granted to Congress to regulate channels of commerce. *See Rapanos v. United States*, 547 U.S. 715, 776 (2006) (Kennedy, J., concurring) (explaining that in *SWANCC*, the requirement of a "significant nexus" to navigable waters avoided constitutional difficulties and federalism concerns); *id*. at 782-83 (citing Supreme Court case law explaining, *inter alia*, that regulation of tributaries may be required in order to manage a navigable water); *Ashland Oil*, 504 F.2d at 1326 (Congress may regulate non-navigable stretches of a river to preserve commerce on the navigable portions); *id*. at 1326-28 (federal authority to preserve navigable waters must extend to tributaries of such rivers, lest they become "a mere conduit for upstream waste").

The States do not dispute these core principles. Instead, their Commerce Clause arguments are premised on arguments that the Rule supposedly covers waters *lacking* a significant nexus to navigable-in-fact waters. *See, e.g.*, States' Br. 34 (arguing that the Rule violates the Commerce Clause because it "sweeps in" water bodies that have only a "tangential" connection to navigable-in-fact waters).[11] But, as set forth in detail herein, the Rule has solid foundations in law and science and protects waters that are wholly within the boundaries of the Clean Water Act and Congress' authority. The Rule therefore covers waters that have a significant impact on the channels of commerce. *See, e.g.*, Final Rule, 80 Fed. Reg. at 37,079 (explaining, for example, that ephemeral headwater streams "shape river channels in traditional

[11] In making this assertion, the States wrongly characterize the decision in *SWANCC*, characterizing it far too broadly. States' Br. 34. In *SWANCC*, the Court held that the Migratory Bird Rule could not be used as a basis for Clean Water Act jurisdiction. The Court decidedly did not rule generally on Clean Water Act jurisdiction over isolated waters.

navigable or interstate waters" by accumulating and releasing materials like sediment and debris). The Rule falls squarely within Congress's power to regulate the channels of commerce.[12]

The States' argument that the Rule violates the Tenth Amendment is likewise premised on a contention that the Rule covers waters lacking the requisite significant nexus. *See* States' Br. 30 (arguing Rule violates the Tenth Amendment because it covers features with "only a remote connection" to navigable waters). Because the States' Tenth Amendment arguments are premised on the same faulty claims, they should fail as well. Moreover, the Tenth Amendment gives way to valid exercise of the Commerce Clause—it is only those rights not reserved to the federal government, that fall to the states. The scope of the Rule here is not a violation of the Tenth Amendment when Congress acts fully within its authority, the Rule is within the scope and purpose of the Clean Water Act as interpreted and directed by the Supreme Court and is fully supported by the record. Congress made clear in the Act the purpose and intent to broadly protect waters of the U.S., a purpose and intent that the Supreme Court agrees with. Congress preserved roles for the states with federal backstops, designed to address the previous failures. Pointing to prairie pothole wetlands or wetlands in Alaska as receiving the protections of the Clean Water Act does not render the Rule constitutionally infirm, especially as the nation has already lost 90% of its wetlands, AR 20848 at 2-45 to 47 and AR 14564 at 4 (discussion and citation to reports of EPA and U.S. Fish and Wildlife Service demonstrating enormous loss of

[12] The States also appear to suggest that the Rule fails to connect to economic activity when it protects human contact with water through recreation (fishing, swimming, boating, kayaking) or activities of a homeowner that pollutes water. But, recreation is a recognized economic activity within interstate commerce. AR 0003 at 8-9 and 21-22; AR 20869 at 14 and 24-25 (referencing *inter alia*, *U.S. v. Byrd*, 609 F.2d 1204, 1210-11 (7th Cir. 1979) (recreational use of inland lakes is commerce)) and at 195 (referencing *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404–05 (9th Cir. 1989) (commercial recreational boating is evidence of capacity to carry commerce)).

wetlands to date), waters that play critical roles in flood control, filtering of pollutants, recharge of waters and wildlife and fish habitat. Each one of these purposes was recognized by Congress as needing protection.

In the end, the States are asking this Court for authority to exempt waters from regulation, pollution, or destruction outside federal minimums or oversight. But, a water body that is protected by the Act can *also* be regulated by the states and subject to even more stringent protections; it does not "displac[e]" state authority. Rather, the Act's protections are a floor; a minimum standard of protection and cleanliness below which Congress determined, as a nation, we should not allow one of our most precious resources to fall. The Act's protections are not, as the States appear to want, a ceiling with states free to allow these public resources to be destroyed. *See* 33 U.S.C. § 1370; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987) (the Act "specifically allows" states to impose stricter standards on pollution sources within their borders). State arguments against federal jurisdiction are not really about *displacing* state authority; they are about a desire for state authority to allow greater pollution and destruction of state waters than federal law would allow.

B. There Is No Due Process Violation Because The Rule Is Not Vague.

The States' claim that the Rule is unconstitutionally vague hinges on the wrong argument that the Rule creates uncertainty about whether particular water bodies will be deemed waters of the United States. In fact, the Rule does the opposite. It promotes clarity in a number of ways.

The Constitution does not demand "perfect clarity" or "precise guidance." *United States v. Williams*, 553 U.S. 285, 304 (2008). "What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id.* at 306. The Supreme Court is further clear that the degree of vagueness tolerated as well as the relative importance of fair notice and enforcement, depends in part on the nature of the enactment and that economic regulation is subject to a less strict test. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The test is ultimately whether a person of common intelligence has a reasonable opportunity to know what is prohibited and need not guess. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also, United States v. Birbragher*, 603 F.3d 478, 484 (8th Cir. 2010). Finally, vagueness challenges should only be entertained and upheld if the statute or rule is *vague in all of its applications*; if some aspect of a plaintiff's conduct is clearly proscribed, a plaintiff cannot then complain of vagueness when applied to the actions of others. *Hoffman Estates*, 455 U.S. at 494-95. "The fact that 'doubts as to the applicability of the language in marginal fact situations may be conceived' does not make an enactment unconstitutionally vague on its face." *Harper v. Crockett*, 868 F.Supp. 1557, 1582 (E.D. Ark. 1994) (quoting *U.S. v. Powell*, 423 U.S. 87, 93 (1975)).

The Rule is plainly not vague. It provides increased direction and certainty to states, businesses, and the public. It outlines exactly what markers Agencies will examine to determine whether a waterbody is subject to the protections of the Act. It describes how those are grounded in science and provides the public a technical support document and science report for additional detail. While the Rule may not have delineated and categorized each of the Nation's water bodies with mathematical precision, that is not what the law requires. The Rule satisfies due process because it puts the regulated public on reasonable notice that certain types of water bodies, using objective and knowable measures present on the landscape, may be covered by the Act. *See also, United States v. Lucas*, 516 F.3d 316, 328 (5th Cir. 2008) (rejecting vagueness challenge to an application of the Act because "the prevalence of wet property . . . and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted 'men of common intelligence' to the *possibility* that the wetlands were waters of the United States" (emphasis added)).

For example, the tributary definition is more than sufficient to alert a landowner to the possibility that a stream, ditch, or other sometimes-wet channel on his property may be a tributary. The words "bed and banks" are commonly understood terms, and the phrase "ordinary high water mark" is defined by reference to plain terms such as "clear, natural line impressed on the bank," "vegetation," and "litter and debris." 33 C.F.R. § 328.3(c)(3). Likewise, the tributary definition provides more than "minimal guidelines" to govern agency staff. *Kolender*, 461 U.S. at 358. And, of course, there is nothing vague about the distance of 4,000 feet. That there may be "close cases" when staff apply the definition to particular water bodies does not make the Rule vague. *Williams*, 553 U.S. at 305-06. Unlike such words as "annoying" and "indecent," which the Supreme Court has rejected as requiring "wholly subjective judgments," *id.* at 306, the terms "bed and banks" and "ordinary high water mark" have accepted technical meanings, and provide concrete guidance to staff making jurisdictional determinations.

The States focus on the extent of the area—4,000 feet or within a floodplain—in which the landowner supposedly must search for waters in significant nexus with foundational waters. Some waters may require some assessment by the landowner of how to comply with the law or a request to the agency for a jurisdictional determination from the Corps, 33 C.F.R. §§ 329.14 and 329.15, something many businesses do for many laws. But, having to determine one's legal obligations before making use of property—whether they be local land-use regulations or provisions of the Clean Water Act—is not a constitutional problem. Moreover, it is appropriate that businesses whose activities pollute, degrade, or destroy natural waters should bear the cost of ensuring they comply with the Act. Otherwise, the public may be saddled with the burden and expense of polluted waters.

The Agencies undertook expert review of an extensive body of science, made and vetted a set of findings, and relied on those findings to define, in accordance with the statute and controlling precedent, the categories of waters that qualify for the Act's protections. The resulting Rule is consistent with due process and, by clarifying the Act's coverage, allows for effective enforcement of the protections that Congress intended for our waters.

V. THE RULE IS NOT A "TRANSFORMATIVE" EXPANSION OF FEDERAL AUTHORITY.

The States' characterization of the Rule as an improper expansion of agency authority is wrong on the law and wrong on the facts.

First, even if the States' characterization of the Rule as a significant expansion of agency authority were correct, this charge would not be a valid basis for striking down the Rule. A duly-promulgated definition of "waters of the United States" that is consistent with the Administrative Procedure Act, the Clean Water Act, the Constitution, and Supreme Court interpretation, would be legally valid even if its coverage were more expansive than prior regulatory coverage.

Second, the States cite to and rely on *Utility Air Regulatory Group v. EPA*, ___ U.S. ___, 134 S.Ct. 2427 (2014) ("*UARG*"), but the situation in *UARG* is fundamentally different from here; the *UARG* case does not support the States' claims. In *UARG*, the Supreme Court points out that an agency interpretation of its statutory authority must account for and be consistent with the design and structure of the statute as a whole. *UARG*,134 S.Ct. at 2442. Plainly the Rule here is fully within the design and structure of the Clean Water Act as a whole. The stated purpose of the Act is to protect and ensure the chemical, physical, and biological integrity of the nation's waters, and to protect the uses of those waters for things far beyond navigation. 33 U.S.C. §§ 1251 and 1313(c). Moreover, the entire structure of the Act shows the intent and purpose that states would play a role in implementing the Act's protections subject to federal oversight and federal minimums in order to address the past failures in earlier attempts to clean up and protect the nation's waters. *See e.g. id*. §§ 1313, 1314, and 1342. States may be more, but never less, protective. Finally, the Act's history demonstrates that Congress intended its reach to be broader than traditionally navigable waters in a way that addressed the shortcomings of the past. The Rule is within the structure of the Act as a whole.

Moreover, the Rule is within the direction of the Supreme Court itself in that it applies to waters of the U.S. and waters in significant nexus with those waters. The Court has given direction and the Rule follows it; it does not strike out in some new direction.

In *UARG*, EPA itself identified the enormity and potential novelty of its actions, *id*. at 2442-43, but here, in stark contrast, the Agencies focus carefully on the direction of the Court and have based the Rule on an extensive, exhaustive, and carefully-researched record.

Finally, the Rule's scope is narrower than the pre-existing regulation. *See generally* Tech. Support Document, AR 20869 at 30-34. For instance, the pre-Rule definition of "waters of the United States" included a broad category that is no longer covered by the Rule: waters whose use, degradation or destruction could affect interstate or foreign commerce. *Id*. at 30; *Cf*. 33 C.F.R. 328.3(a)(3). *SWANCC* created legal uncertainty about this category of waters, but did not invalidate that provision. *See SWANCC*, 531 U.S. at 174. The Rule also categorically excludes, for the first time, certain waters from the Act's coverage. *See* 33 C.F.R. 328.3(b). It also defines covered waters relatively narrowly. *Compare id*. at 328.3(c)(3) (defining tributaries as requiring, *inter alia*, a bed and banks and ordinary high water mark), *with id*. at 328.3(a)(5) (no definition for covered "tributaries") and SAB criticism that science supported a broader definition of tributary. And it provides for the first time a distance cut-off for covered waters, excluding waters outside that distance from even case-by-case consideration. *Id.* at 328.3(a)(8).

The Rule rests firmly within the direction of the Supreme Court and the overall purpose, intent and language as a whole of the Clean Water Act. It is grounded on an extensive record and is narrower than earlier rule and practice. As such there is no basis for an argument that the Rule is an improper "expansion" of federal authority.

VI. THE FINAL RULE DID NOT RUN AFOUL OF NOTICE AND COMMENT REQUIREMENTS.

There is no violation here of the notice and comment requirements of the Administrative Procedure Act. The Administrative Procedure Act requires notice and comment on the terms or substance of the proposed rule or a description of the subjects and issued involved. 5 U.S.C. § 553(b)(3). The notice for a proposed rule need not specify or use the precise language that is ultimately adopted and can even incorporate fairly substantial changes as long as the final rule is a "logical outgrowth" of the proposed rule and where the proposed rule and topics addressed was sufficient to fairly apprise interested parties of the issues and proposals involved and in play. *See, e.g., Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 174 (2007); *Veteran's Justice Grp., LLC v. Sec'y of Veterans Affairs,* 818 F.3d 1336, 1344 (Fed. Cir. 2016). Courts will find that a rule is not a logical outgrowth in instances where the D.C. Circuit has described an agency "pulling a surprise switcheroo" where a final rule is the opposite, unanticipated result from an agency proposal. *See, Envtl. Integrity Project v. EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005) and *Shell Oil Co. v. EPA,* 950 F.2d 741, 750-51 (D.C. Cir. 1991). The Rule here is a logical outgrowth of the proposed rule.

The proposed rule stated its purpose as identifying waters that will be protected under the Clean Water Act and for waters not categorically protected, it set forth definitions and processes for how those determinations will be made in the future. While the proposed rule's language did not precisely mirror the final language, it plainly provided information and notice sufficient to fairly apprise the states and other interested parties of the issues and proposals involved and in play. In particular, the proposed rule sought comment and input on whether and how the final rule should address specific bodies of water that in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters such as prairie pothole wetlands or Texas coastal plain wetlands. 79 Fed. Reg. 22,188, at 22,192-93, 22,250-51, and 22,261 (April 21, 2014). The proposed rule asked for comments on the issues of how to cover and define tributaries and on the concept and definition of "adjacency" and "neighboring." *Id*. While the Agencies moved from identifying the neighboring component of adjacency with reference to terms such as floodplain to terms that also included distance and other proximity measures, *all* of those concepts are rooted in proximity and distance measures from foundational waters. *Compare, Id*. at 22,206-07 to 80 Fed. Reg. at 37,058. In fact, in the proposed rule, the Agencies noted that in certain circumstances, the Agencies would consider distance as part of the assessment of whether a water was "neighboring." 79 Fed. Reg. at 22,207. Plainly, the public was on notice. Specific distance measures of "adjacency" are not outside the realm of what the States and interested parties could and should have anticipated in submitted comments on the proposed rule. There is no "switcheroo" that harmed their interests.[13]

Finally, the Agencies made a draft of the Science Report and the Technical Support Document available for review during the comment period. 79 Fed. Reg. at 22,188 and AR 0004 and 8592. Nothing in the finalization of these documents deprived the States' of their chance to

[13] As for the expanded exclusion that left more waters affected by agriculture unprotected, the States' grievance is audacious—the States suggest that if they had known EPA was giving away exclusions, they would have asked for more. States' Br. 46. It is not a violation of law that the States' did not comment on and ask for everything they might have desired from the Rule.

understand and comment on the issues and proposals in play, nor were they deprived of the ability to advocate for their much-narrower version of jurisdiction under the Act.

CONCLUSION

The Rule fully and properly implements the purpose, intent, and direction of the Clean Water Act and it does so in compliance with Supreme Court direction. Further, the Rule is well-grounded in the best science available, ensuring full adherence to Justice Kennedy's and all the Circuits' direction to ensure that waters receiving the Act's protections are in significant nexus to waters of the U.S. The States' arguments do not demonstrate any infirmity with the Rule on either the science, or Supreme Court and Circuit Court precedent, or on Constitutional or basic administrative law grounds. Defendant-intervenor Sierra Club respectfully requests that the Court upheld and affirm the Rule and deny the States' Motion for Summary Judgment.

Respectfully submitted this 16th day of July 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Janette K. Brimmer
Janette K. Brimmer